BITARA ANGKASA SDN BHD v. CHEOK LAM CHUAN & ORS

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
HASHIM HAMZAH JCA
LIM CHONG FONG JCA
[CIVIL APPEAL NO: N-01(NCVC)(W)-283-05-2021]
18 SEPTEMBER 2023

Abstract – *A subsequent purchaser would only have an indefeasible title if he is a bona fide purchaser for valuable consideration, pursuant to the proviso in s. 340(3) of the National Land Code. The basic element of bona fide or good faith is the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of the entry of the transaction.*

LAND LAW: *Sale and purchase of land – Subsequent purchase – Transfer of land to another by imposter – Subsequent transfer of land to company – Whether company immediate purchaser or subsequent bona fide purchaser for valuable consideration of land – Whether company acquired deferred indefeasibility to title of land – Whether subsequent purchaser protected under s. 340(3) of National Land Code*

LAND LAW: *Transfer – Fraudulent transfer – Land scam – Recovery of land – Transfer of land to another by imposter – Whether there was conspiracy to defraud owner of his title to land – Whether fraud established*

TORT: *Negligence – Land – Land scam – Recovery of land – Transfer of land to another by imposter – Whether Land Registry negligent in permitting issuance of title to land to imposter – National Land Code, s. 22*

This was a land scam case appeal. Pursuant to a declaration of trust made in 1982, the original registered proprietor of the land in question was the first respondent ('LC Cheok') and Cheok Yit Tuck (who had passed away in 2009) as joint trustees. The title to the land was originally held by Cheok Yit Tuck who later handed it to a solicitor ('Seah Choon Chye') for safekeeping. The ownership of the land was transferred to solely LC Cheok in his personal capacity in 2001. Pursuant to a sale and purchase agreement ('SPA') in 2011, LC Cheok sold the land to one Charles Oh. In 2016, LC Cheok's authorised representative surrendered the old issue document of title of the land to the land office in exchange for the new computerised issue document of title of the land. Pursuant to the SPA, the land was transferred from LC Cheok to Charles Oh and registered accordingly. By another SPA in 2017 ('second SPA'), Charles Oh sold the land to the appellant, Bitara Angkasa Sdn Bhd ('Bitara Angkasa'), and registered accordingly. Upon the discovery of the second SPA, LC Cheok lodged a private caveat on the land in 2018 and

A subsequently commenced a suit in the High Court to seek the recovery of the land. LC Cheok principally contended that: (i) the transfer of the land to Charles Oh by an imposter was fraudulent and must be set aside; (ii) the subsequent transfer of the land to Bitara Angkasa was defeasible as Bitara Angkasa was not a *bona fide* purchaser; (iii) the imposter conspired with a B lawyer ('Richard Leong') and Charles Oh to defraud LC Cheok of his title to the land. Additionally, Charles Oh and Bitara Angkasa also conspired with one another to defraud LC Cheok; and (iv) the third and fourth respondents (collectively 'Land Registry') were also negligent in permitting the issuance of the title to the land to the imposter. The High Court Judge ('HCJ') held C that: (i) Richard Leong was innocent because he was not involved whatsoever in the transfer of the land; (ii) Charles Oh committed fraud as he had failed to defend himself in the suit. Judgment in default was accordingly entered against him ('default judgment'); (iii) Bitara Angkasa was an immediate purchaser that did not enjoy the protection of s. 340(3) of the National Land Code ('NLC'). That notwithstanding, the HCJ further found that Bitara D Angkasa was not a *bona fide* purchaser in that Bitara Angkasa failed to demonstrate that it was not complicit in the fraud; (iv) since Bitara Angkasa's claim against LC Cheok and the Land Registry were predicated on satisfying the court that it was tainted with fraud, its claim for contribution and indemnity against the Land Registry failed too. Hence, the present appeal.

E **Held (allowing appellant's appeal against first respondent; making no order in respect of appellant's appeal against second respondent; entering judgment for respondent against third and fourth respondents):**
Per Lim Chong Fong JCA delivering the judgment of the court:

F **(1)** The relevant fact scenario here involved forgery by A but also with B in fraudulent cahoots (established by reason of the default judgment) and thereafter transferred to C. By analogy, Bitara Angkasa was a subsequent purchaser that acquired deferred indefeasibility to the title of the land notwithstanding that Charles Oh had committed fraud in cahoots with G LC Cheok's imposter. The fraud by Charles Oh here was only presumed based on the default judgment obtained by LC Cheok. (paras 39, 41 & 42)

(2) As a matter of law, a subsequent purchaser would only have an indefeasible title if that person is a *bona fide* purchaser for valuable H consideration to the proviso in s. 340(3) of the NLC. Bitara Angkasa bought the land from Charles Oh at the price of RM1.2 million and the transaction was handled by their respective solicitors. A proper SPA, *to wit* the second SPA was drawn up. The purchase price was fully paid, *albeit* late, but Bitara Angkasa also paid late payment interest to Charles I Oh. Since the purchase price of the land had been fully paid by Bitara Angkasa (which normally is the dominant consideration) and there were

proper searches done on the land followed by a proper conveyancing documentation by Bitara Angkasa's solicitors, Bitara Angkasa was a *bona fide* purchaser for valuable consideration of the land. (paras 44 & 48-50)

(3) The Land Registry (i) did not have any record whatsoever on the issuance of the new title and the resultant transfer that took place in respect of the land; (ii) could not explain the reason for the issuance of the new title and transfer of the land from LC Cheok and Cheok Yit Tuck as joint trustees to LC Cheok and transferred from LC Cheok to Charles Oh in spite of the fact that the Land Registry was then still operating under the manual system, having a master register document of title pursuant to s. 158 of the NLC; and (iii) could not adequately explain the transfer for the land to Charles Oh, particularly why there was no ascertainment of the true identity of the purported LC Cheok. There was no formal comprehensive internal investigation carried out by the Land Registry to ascertain the truth of the matters. In other words, there was no explanation by the Land Registry at all to account for their statutory acts and omissions. This non-explanation did not bode well for the Land Registry in defence against LC Cheok's gross negligence claim against them. In the premises, the Land Registry must compensate LC Cheok, as trustee for the beneficiaries, damages for loss of their land and litigation expenses incurred as the result thereof. Although the HCJ need not then decide on LC Cheok's claim against the Land Registry because LC Cheok succeeded against Bitara Angkasa, LC Cheok had in the circumstances based on *res ipsa loquitor* established gross negligence on the part of the Land Registry in the discharge of their statutory duty. That notwithstanding, the non-explanation could not also avail the Land Registry reliance on s. 22 of the NLC either since the burden of proof was upon the Land Registry to prove that it had acted in good faith. (paras 65-68)

Case(s) referred to:

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***

CIMB Bank Bhd v. AmBank (M) & Ors [2017] 9 CLJ 145 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(refd)***

Heveaplast Marketing Sdn Bhd v. See Leong Chye & Ors And Other Appeals [2017] 2 CLJ 43 CA ***(refd)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Overseas Realty Sdn Bhd v. Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party) [2014] 8 CLJ 107 HC ***(refd)***

Pendaftar Hakmilik Negeri Selangor v. Caesius Development Sdn Bhd & Ors And Another Appeal [2020] 3 CLJ 327 CA ***(refd)***

A *Pendaftar Hakmilik Negeri Selangor & Ors v. Shaifulizam Mohd Saleh & Anor And Another Appeal [2020] 5 CLJ 595 CA* ***(refd)***
Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals [2019] 3 CLJ 441 FC ***(refd)***
Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors [2016] 4 CLJ 510 CA ***(refd)***
B *State Tailor Sdn Bhd v. Nallapan [2005] 2 CLJ 167 CA* ***(refd)***
Tan Yin Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***
Tirai Kristal Sdn Bhd v. Pengarah Tanah Dan Galian Wilayah Persekutuan Kuala Lumpur [2018] 2 CLJ 212 CA ***(refd)***
Yew Foo Chun v. Wong Nye Keong & Ors [2014] 1 LNS 189 HC ***(refd)***

C **Legislation referred to:**
Courts of Judicature Act 1964, s. 69(5)
National Land Code, ss. 22, 158, 340(1), (3)

For the appellant - Brian Ernest Cumming & Teo Qing Qing; M/s Gideon Tan Razali Zaini
D *For the 1st respondent - Manian Raju & Raswanti Nagaindren; M/s Manian Raju & Assocs*
For the 2nd respondent - Unrepresented
For the 3rd respondent - Marsilawati Mohamad Shah; SFC

[Editor's note: Appeal from High Court, Seremban; Civil Suit No: NA-21NCVC-9-11-2018 (overruled).]

E

Reported by Lina E

JUDGMENT

F **Lim Chong Fong JCA:**

Introduction

[1] This is a land scam case appeal.

[2] For convenience and brevity, the parties will hereinafter be referred as follows:

G (i) appellant: Bitara Angkasa;

(ii) first respondent: LC Cheok;

(iii) second respondent: Charles Oh; and

H (iv) third & fourth respondents collectively: Land Registry

Background

[3] The land concerned is presently held under GRN 159181, Lot 14184, Pekan Lukut, Daerah Port Dickson, Negeri Sembilan (formerly HS(D) 21645, PT 2730, Pekan Lukut, Daerah Port Dickson, Negeri Sembilan Lot no. 1493 and Folio no. 45 ("land").

I

[4] Originally, the land was part of a larger plot of land held under Geran 17067, Lot 1493 which was then subdivided into four pieces of land held under separate titles on 31 December 1999.

[5] Pursuant to a declaration of trust made on 24 May 1982, the original registered proprietor of the land was in the name of LC Cheok and Cheok Yit Tuck (who passed away on 2 June 2009) as joint trustees. The title to the land was held originally by Cheok Yit Tuck who later handed it to a solicitor, Seah Choon Chye for safekeeping.

[6] That notwithstanding, the ownership of the land was on 15 February 2001 transferred to solely LC Cheok in his personal capacity.

[7] By a sale and purchase agreement dated 11 May 2011 ("SPA"), the land was sold by LC Cheok to Charles Oh.

[8] On 18 May 2016, LC Cheok's authorised representative, Cheok Tuan Joo surrendered the old issue document of title of the land to the Port Dickson land office in exchange for the new computerised issue document of title of the land.

[9] Pursuant to the SPA, the land was on 13 September 2016 transferred from LC Cheok to Charles Oh and registered accordingly.

[10] By another sale and purchase agreement dated 13 February 2017 ("second SPA"), the land was sold by Charles Oh to Bitara Angkasa.

[11] Pursuant to the second SPA, the land was on 26 September 2017 transferred from Charles Oh to Bitara Angkasa and registered accordingly.

[12] Upon the discovery of the sale of the land to Bitara Angkasa, LC Cheok on 24 May 2018 lodged a private caveat on the land.

[13] Additionally, the Land Registry also, on 28 May 2018, lodged a registrar's caveat on the land.

[14] Subsequently on 14 November 2018, LC Cheok commenced Seremban High Court Suit No. NA-21NCVC-9-11-2018 ("suit") to seek recovery of the land. The reliefs sought in the suit are as follows in the statement of claim:

> 46. Oleh demikian, Plaintif menuntut terhadap Defendan-defendan pengisytiharan-pengisytiharan perintah-perintah, arahan-arahan dan relief-relief seperti berikut:
>
> (a) Suatu pengisytiharan bahawa Plaintif adalah pemilik berdaftar yang sah terhadap tanah yang dipegang di bawah Geran 159181, Lot 14184, Pekan Lukut, Daerah Port Dickson Negeri Sembilan;
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> (b) Suatu pengisytiharan bahawa pindahmilikan Geran 159181, Lot 14184, Pekan Lukut, Daerah Port Dickson, Negeri Sembilan ke atas nama Defendan ke-3 melalui No. Perserahan 23690/2017 pada 26 September 2017 adalah batal dan tidak sah;

(c) Suatu perintah bahawa pindahmilikan Geran 159181, Lot 14184, Pekan Lukut, Daerah Port Dickson, Negeri Sembilan ke atas nama Defendan ke-3 melalui No. Perserahan: 23690/2017 sebagai pemilik berdaftar dimansuhkan atau dibatalkan dengan serta merta oleh Defendan ke-4 dan/atau Defendan ke-5, iaitu Pendaftar Hakmilik, Negeri Sembilan, dan/atau Pengarah Tanah dan Galian Negeri Sembilan;

(d) Bahawa Defendan ke-4 dan/atau Defendan ke-5 hendaklah dengan serta-merta memberi kesan kepada pengisytiharan-pengisytiharan dan perintah-perintah yang dikurniakan oleh Mahkamah yang mulia ini menurut Seksyen 417 Kanun Tanah Negara;

(e) Ganti rugi untuk frod ditaksirkan di hadapan Timbalan Pendaftar dan/atau Penolong Kanan Pendaftar dan dibayar oleh Defendan Pertama dan/atau Defendan ke-2 dan/atau Defendan ke-3 kepada Plaintif;

(f) Ganti rugi teruk ditaksirkan di hadapan Timbalan Pendaftar dan/atau Penolong Kanan Pendaftar dan dibayar oleh Defendan Pertama dan/atau Defendan ke-2 dan/atau Defendan ke-3 kepada Plaintif;

(g) Secara alternatif, terhadap Defendan Pertama, Defendan ke-2 dan Defendan ke-3;

Ganti rugi am untuk konspirasi frod ditaksirkan di hadapan Timbalan Pendaftar dan/atau Penolong Kanan Pendaftar;

(h) Secara alternative, bahawa Defendan ke-4 dan/atau Defendan ke-5 menanggung rugi (indemnify) segala kerugian yang dialami oleh Plaintif sehubungan hartanah yang dipegang bawah Geran 159181, Lot 14184, Pekan Lukut, Daerah Port Dickson, Negeri Sembilan;

(i) Faedah;

(j) Kos; dan

(k) Relif-relif lanjut atau lain seperti mana yang dianggap wajar dan sesuai oleh Mahkamah yang mulia.

In The High Court

[15] LC Cheok principally contended that the transfer of the land to Charles Oh by an imposter of LC Cheok was fraudulent and must hence be set aside. Moreover, he contended that the subsequent transfer of the land to Bitara Angkasa was defeasible because Bitara Angkasa was not a *bona fide* purchaser. In this regard, the imposter conspired with a lawyer, Richard Leong Mei Hing and Charles Oh to defraud LC Cheok of his title to the land. Additionally, Charles Oh and Bitara Angkasa also conspired with one another to defraud LC Cheok. Those notwithstanding, the Land Registry was also negligent in permitting the issuance of the title to the land to the imposter.

[16] Charles Oh did not defend the suit and judgment in default was accordingly entered against him.

[17] Bitara Angkasa in defence contended that it was a *bona fide* subsequent purchaser of the land for valuable consideration. That notwithstanding, Bitara Angkasa sought contribution and indemnity from Charles Oh and the Land Registry in the event it was found liable to LC Cheok.

[18] The Land Registry took the position that it was puzzled as to how the impugned transfers and registrations occurred. Nonetheless, the Land Registry sought immunity pursuant to s. 22 of the National Land Code ("NLC"). Furthermore, the Land Registry contended that it is not liable in any way to Bitara Angkasa because of contributory negligence and/or did not suffer actual loss following the case of *Pendaftar Hakmilik Negeri Selangor v. Caesius Development Sdn Bhd & Ors And Another Appeal* [2020] 3 CLJ 327 CA. In addition, Bitara Angkasa was a party or privy to the fraud in the impugned transfer and registration; thus, disentitled to immunity in any event following the case of *Heveaplast Marketing Sdn Bhd v. See Leong Chye & Ors And Other Appeals* [2017] 2 CLJ 43; [2016] MLJU 835.

[19] The learned High Court Judge firstly found that the solicitor, Richard Leong Mei Hing is innocent because he was not involved whatsoever in the transfer of the land. The land was transferred by his imposter who conspired with the imposter of LC Cheak to Charles Oh.

[20] Next and following the case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987 FC, the learned High Court Judge secondly found that Charles Oh committed fraud as claimed by LC Cheok because he failed to defend himself in the suit. He held as follows:

> 24. By the same token, the failure by Charles Oh in the present case to defend the plaintiff's contention of fraud against him meant that the allegation of fraud against him was taken to have been proven.

[21] In consequence, the learned High Court Judge thirdly found that Bitara Angkasa is an immediate purchaser that did not enjoy the protection of s. 340(3) of the NLC following *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271 FC. He held as follows:

> 29. Thus the short – but complete – answer was that, because Bitara Angkasa had dealt directly with the rogue Charles Oh, the title that Bitara Angkasa acquired was defeasible pursuant to section 340(2) of the National Land Code. Whether or not it was a *bona fide* purchaser who had provided valuable consideration did not change the conclusion that its title was defeasible.

[22] That notwithstanding, the learned High Court Judge fourthly further found that the Bitara Angkasa was not a *bona fide* purchaser in that Bitara Angkasa failed to demonstrate that it was not complicit in the fraud. He held as follows:

40. Upon carefully assessing the evidence in this case, I was of the view that Bitara Angkasa had not successfully discharged its evidential burden to establish that it was not complicit in the fraud. The following were the matters that I had taken into account in coming to this finding of fact;

(a) Even though DW2 testified thet Mr Looh had invested RM1.1 million into Bitara Angkasa, there was no independent corroboration of this fact. No documentary evidence was adduced to prove this assertion, and Mr Looh was not called to testify;

(b) Mr Looh had lodged a private caveat over the land on 13 November 2017. The information set out in the caveat lodgement form did not accord with the position that his interest over the land was by way of security only, but instead stated the fact that he had purchased the land in question and had lodged the caveat in order to protect his interests pending completion of his acquisition;

(c) Furthermore, under cross-examination DW2 admitted to having received RM77,000 as deposit from Mr Looh pursuant to the terms of the sale and purchase agreement. This was at odds with his own testimony that the sale and purchase agreement was only intended as security for Mr Looh's investment of RM1.1 million in Bitara Angkasa. Why would there be a need for Mr Looh to pay the RM77,999 if the sale and purchase agreement was only intended to operate as security for his investment?;

(d) If the story of Mr Looh purported investment in Bitara Angkasa was untrue, then the fact that it had sought to sell the land so shortly after having acquired it raised questions regarding the complicity of Bitara Angkasa in the scheme to defraud the plaintiff;

(e) DW2 testified at trail:

> I as the Director of the 3rd Defendant had *via* the arrangement made by Kelvin Keng visited the said land on or about end of October 2016.
>
> This was patently untrue, because by his own testimony he had only acquired Bitara Angkasa on 16 January 2017;

(f) DW2 testified that he had paid RM240,000 as deposit to Charles Oh *via* his solicitors even before signing the sale and purchase agreement. This was a highly unusual on two counts: first RM240,000 constituted 20% of the total purchase price and would have been out of the norm as far as deposits were concerned. Secondly, it appeared that he was willing to trust Charles Oh with the deposit payment even in the absence of any written agreement when DW2 had himself acknowledge that he had never met Charles Oh;

(g) The first recital to the 9 November 2019 sale and purchase agreement (the third SPA) described the property to be sold as a "unit of one and a half (1 1/2) storey factory", which was incorrect, as the property was vacant land. It was difficult to imagine that parties to genuine transaction would have let such a fundamental error slip into the acquisition documentation, bearing in mind that the purchase price was not an insignificant sum. Of course, had the sale been completed, then it may have very well put the property out of reach for legal redress by the plaintiff, unless he could positively establish the complicity of Bitara Angkasa in the fraud. This may very well explain the haste in which Bitara Angkasa sought to sell the land; and

(h) There were discrepancies in the manner in which the Form 14A had been executed and attested that was never satisfactorily explained by DW2 or by the solicitors acting for Bitara Angkasa.

Firstly, the seal of Bitara Angkasa was purported to have been affixed on the Form 14A on 6 June 2017. There were two signatures accompanying the seal: on of Lee Lun Teong (DW2) and the other a signature of Soong Mei Ling. However, Soong Mei Ling was not even a director of Bitara Angkasa at the material time. At some point after the seal was affixed, a third signature was added.

At trial, the solicitor who had attested to signature of Charles Oh, Ms Normila Hussain (DW4), admitted that when she received the Form 14A, it had already been executed by the parties, which meant that she could not have attested to the fact that Charles Oh had executed the document before her.

[23] Fifthly, the learned High Court Judge therefore found that since Bitara Angkasa's claim against LC Cheok and the Land Registry were predicated on satisfying the court that it was not tainted with fraud; hence Bitara Angkasa's claim for contribution and indemnity against the Land Registry failed too.

[24] As the result, the learned High Court Judge on 30 April 2021 decided and ordered ("decision") as follows:

Maka Adalah Dengan Ini Dihakimi Dan Diperintahkan Bahawa

(a) Diisytiharkan bahawa Plantif ialah pemilik berdaftar yang sah terhadap hartanah yang dipegang bawah Geran 159181, Lot 14184, Pekan Lukut, Daerah Port Dickson, Negeri Sembilan;

(b) Diisytiharkan bahawa pindahmilik hartanah bawah Geran 159181, Lot 14184, Pekan Lukut, Daerah Port Dickson, Negeri Sembilan ke atas nama Bitara Angkawa Sdn Bhd iaitu Defendan Ke-3 melalui Nombor Perserahan: 23690/2017 pada 26 September 2017 adalah batal dan tidak sah;

(c) Diperintahkan dan diarahkan bahawa pindahmilikan Geran 159181, Lot 14184, Pekan Lukut, Daerah Port Dickson, Negeri Sembilan ke atas Defendan Ke-3 melalui Nombor Perserahan: 23690/2017 sebagai pemilik berdaftar hendaklah dimusnahkan atau dibatalkan dengan serta merta oleh Defendan Ke-4 dan/atau Defendan Ke-5, iaitu Pendaftar Hakmilik Negeri Sembilan dan/atau Pengarah Tanah dan Galian Negeri Sembilan;

(d) Bahawa Defendan Ke-4 dan/atau Ke-5 hendaklah dengan serta merta memberi kesan kepada pengisytiharan-pengisytiharan dan perintah-perintah yang tersebut di atas bawah seksyen 417 Kanun Tanah Negara;

(e) Ganti rugi untuk frod, ganti rugi teruk dan ganti rugi am terhadap Defendan Pertama hendaklah ditaksirkan oleh Mahkamah di hadapan hakim;

(f) Faedah untuk pre-judgment adalah kadar 5% setahun dari 15 Februari 2001 sehingga tarikh penghakiman;

(g) Faedah untuk post judgment adalah kadar 50% setahun dari 1 Mei 2001 sehingga penyelesaian penuh;

(h) Tuntutan terhadap Defendan Kedua, Keempat dan Kelima adalah ditolak;

(i) Plaintif hendaklah membayar kos sebanyak RM50,000 kepada Defendan Kedua dan Defendan Pertama hendaklah menanggungrugi (indemnify) kos tersebut;

(j) Defendan Pertama hendaklah membayar sebanyak RM50,000 kepada Plaintif;

(k) Defendan Ketiga hendaklah membayar sebanyak RM50,000 kepada Plaintif;

(l) Tiada perintah terhadap kos terhadap Defendan Keempat dan Defendan Kelima

Dan Setelah Juga Dihakimi Bahawa tuntutan Defendan Ketiga terhadap Defendan Pertama, Defendan Keempat dan Defendan Kelima untuk suatu sumbangan dan indemniti adalah ditolak.

[25] Bitara Angkasa was dissatisfied with the decision and order of the High Court and lodged its appeal on 17 May 2021.

Findings Of This Court

[26] This is an after-trial appeal; hence our function is merely review based on the record. We are guided by *dicta* of Steve Shim (CJ (Sabah & Sarawak)) in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 FC on appellate intervention:

> The Court of Appeal had clearly borne in mind the central feature of appellate intervention *ie*, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of the evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process.

See also: *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1; [2020] 6 MLRA 193.

[27] Simply put, we have to be satisfied that the learned High Court Judge has been plainly wrong in the making of the decision; otherwise the decision stands.

[28] All the parties except Charles Oh were before us. Bitara Angkasa has advanced 16 grounds of appeal in its memorandum of appeal of which we have, for convenience, summarised into three broad categories and are accordingly dealt *seriatim*.

(i) Is Bitara Angkasa An Immediate Or A Subsequent Purchaser?

[29] The learned High Court Judge found that Bitara Angkasa is an immediate purchaser of the land by reason that Charles Oh has been involved in the fraud as claimed by LC Cheok because judgment in default has been entered against him; see para. [21] above.

[30] According to Bitara Angkasa, it is instead a subsequent purchaser of the land and thus entitled to rely on s. 340(1) and (3) of the NLC. In other words, Bitara Angkasa enjoyed deferred indefeasibility of title to the land.

[31] It is therefore apt to reproduce the governing statutory provision codified in s. 340 of the NLC which reads:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

[32] The interpretation of s. 340 of the NLC on indefeasibility of title *vis-a-vis* an immediate purchaser and subsequent purchaser is a question of law which has been conclusively settled in *Tan Yin Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 FC (overruling *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 FC) where Arifin Zakaria CJ (Malaya) (later CJ) held as follows with emphasis added by us:

[42] At this juncture it may be appropriate for us to consider what was in fact the decision in *Adorna Properties* and the underlying reasons for the decision. In that case two questions were posed to the Federal Court arising from the decision of the Court of Appeal in *Boonsoom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17. What concern us is the second question which reads: "Whether the appellant, a *bona fide* purchaser for valuable consideration without notice, acquired an indefeasible title to the land by virtue of s. 340(3) of the NLC." The court answered the question in the positive.

[43] The reasons underlying this decision appeared in the judgment of the court rendered by the Eusoff Chin CJ. He said that the court is not to look at what is the Torrens system as practised in other jurisdictions but to interpret s. 340 as it stands, "... and to find the real intention of Parliament when enacting it... and the intention of Parliament must be deduced from the language used."

[44] *We agree with the court that the issue before the court, and likewise before us, is one of proper interpretation to be accorded to s. 340(1), (2) and (3) of NLC. The court then went on to say that s. 340(1) of the NLC confers an immediate indefeasible title or interest in land upon registration, subject to the exceptions set out in s. 340(2) and (3). Thus far, we think the court was right. The difficulties arose in the interpretation of sub-s.(2) and sub-s. (3).* This is what it said at p. 342:

> Subsection (2) states that the title of any such person, *ie* any registered proprietor or co-proprietor for the time being is defeasible if one of the three circumstances in sub-s. (2)(a), (b) or (c) occurs. We are concerned here with sub-s. (2)(b) where the registration had been obtained by forgery. Subsection (3) says that where that title is defeasible under any of the three circumstances enumerated under sub-s. (2), the title of the registered proprietor to whom the land was subsequently transferred under the forged document, is liable to be set aside. Similarly, sub-s. (3)(b) says, any interest under any lease, charge or easement subsequently "granted thereout", *ie*, out of the forged document may be set aside.

At p. 343 it said:

> The proviso to sub-s. (3) of s. 340 of the NLC deals with only one class or category of registered proprietors for the time being. It excludes from the main provision of sub-s. (3) this category of registered proprietors so that these proprietors are not caught by the main provision of this subsection. Who are those proprietors? The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s.(3). For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document.

[45] In that case, it was stated that the court was concerned with sub-s. (2)(b) where the registration had been obtained by forgery. This is correct because the appellant obtained its title through or under a forged instrument of transfer. That was the finding of the Court of Appeal and affirmed by the Federal Court.

[46] *The Court of Appeal took the view that "s. 340 of the code makes defeasible the title of a registered proprietor tainted by one or more of the vitiating elements set out in its second subsection but creates an exception in favour of a bona fide purchaser who takes his title from such a registered proprietor." By this bifurcation, the Court of Appeal concluded that Parliament had intended to confer deferred and not immediate indefeasibility*. The Court of Appeal stated with approval the view of Dr. Visu Sinnadurai in his book entitled *"Sale and Purchase of Real Property in Malaysia"* which reads:

> In Malaysia, it is submitted that under s. 340 of the National Land Code, deferred indefeasibility applies. The registered proprietor who had acquired his title by registration of a void or voidable instrument does not acquire an indefeasible title under s. 340(2)(b). The indefeasibility is postponed until the time when a subsequent purchaser acquires the title in good faith and for valuable consideration. In other words, a registered proprietor, the vendor, under a sale and purchase agreement, even though he himself does not possess an indefeasible title, may give an indefeasible title to a *bona fide* purchaser.

A

[47] *What the Federal Court differed from the Court of Appeal was on the effect to be given to sub-s.(3).*

[48] *Having said that the appellant in Adorna Properties had acquired its title to the land through or under a forged instrument and it therefore came under the category of title in sub-s. (2)(b), the court then went on to hold that such a title is insulated from impeachment by the proviso to sub-s. (3).*

B

[49] *The question is, does the proviso following immediately after sub-s. (3), apply to the other provisions of s. 340, in particular to sub-s. 2(b). This can only be deduced from the proviso itself. NS Bindra's, Interpretation of Statutes*, 9th edn, at p. 110 states that: "A proviso is something engrafted on a preceding enactment. The proviso follows the enacting part of a section and is in a way independent of it. Normally, it does not enlarge the section, and in most cases, it cuts down or makes an exception from the ambit of the main provision." A proviso to a subsection would not apply to another subsection (*M/s Gajo Ram v. State of Biha*r AIR [1956] Pat 113). A proviso carves out an exception to the provision immediately preceding the proviso and to no other (*Ram Narain Sons Ltd v. Ass Commr of Sales* – tax AIR [1955] SC 765).

C

D

[50] *As we see it, sub-s. (3) merely provides that any title or interest of any person or body which is defeasible by reason of any the circumstances specified in sub-s. (2) shall continue to be liable to be set aside in the hands of subsequent holder of such title or interest. This subsection, however, is subject to the proviso which reads:*

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> *Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.*

[51] *We are of the view that the proviso is directed towards the provision of sub-s. (3) alone and not to the earlier subsection. This in our view is supported by the use of the words "in this subsection" in the proviso. Therefore, its application could not be projected into the sphere or ambit of any other provisions of s. 340.*

F

[52] *Furthermore, eventhough sub-s. (3)(a) and (b) refer to the circumstances specified in sub-s. (2) they are restricted to sub-sequent transfer or to interest in the land subsequently granted thereout. So it could not apply to the immediate transferee of any title or interest in any land.* Therefore, a person or body in the position of *Adorna Properties* could not take advantage of the proviso to the sub-s. (3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s. (3) ought not to be extended as was done by the Court in *Adorna Properties*, to apply to sub-s. (2)(b). By so doing the court had clearly gone against the clear intention of Parliament. This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest.

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> [53] *For the above reasons, with respect, we hold that the Federal Court in Adorna Properties had misconstrued s. 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s. (3) equally applies to sub-s. (2). By so doing the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision of s. 340 of the NLC.* (emphasis added)

[33] We are however mindful that the learned High Court Judge found Bitara Angkasa an immediate purchaser of the land based on the following dicta of Abang Iskandar FCJ (now PCA) in *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* (*supra*) with emphasis added by us:

> [102] *The immediacy of the purchase relates to the vitiating vendor, not how far removed it is in the tally among the purchasers. To be a subsequent purchaser, it must have purchased the interest in the property that is being used as a security from a purchaser who is one that is bona fide for value. Any direct dealing with a rogue will necessarily vitiate the transaction rendering it defeasible, although it is duly registered.*
>
> [103] Learned Justice Jeffrey Tan FCJ in the case of *CIMB Bank Bhd v. AmBank (M) & Ors* [2017] 9 CLJ 145 at 183; [2017] 5 MLJ 142 at 179 ("*CIMB Bank* case") had occasion to cite the case of *Wright v. Lawrence* (2007) 278 DLR (4th) 698 as supporting, if not propounding, that legal proposition. We reproduce below, his answer, in his dissenting judgment to the question posed before the apex court, like so:
>
> > [90] I would answer the leave question as follows: a chargee is a purchaser within the meaning of the proviso. But the interest of a charge is defeasible, if the chargee were not a subsequent purchaser in good faith and for valuable consideration. Whether a purchaser is an immediate or subsequent purchaser is not determined by a tally of the number of transactions. Transactions could be contrived by fraudsters and accomplices (see *Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems by Pamela O'Connor*, Edin LR Vol 13 pp 194-223). A purchaser is a subsequent purchaser only if his title or interest were derived from an immediate purchaser (his vendor) in good faith and for valuable consideration. For the title or interest of the subsequent purchaser to be indefeasible, both immediate and subsequent purchasers must be purchasers in good faith and for valuable consideration (see *Wright v. Lawrence* (2007) 278 DLR (4th) 698 at para [39] per Gillese JA, delivering the judgment of the court).

[34] It must nonetheless be noted the case of *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* (*supra*) was decided relying on the dissenting judgment of Jeffery Tan FCJ in *CIMB Bank Bhd v. AmBank (M) & Ors* [2017] 9 CLJ 145 FC. In the majority judgment, Md Raus Sharif CJ held as follows with emphasis added by us:

A [31] This concept of indefeasibility was further explained by this court in the case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLRA 432; [2014] 2 MLJ 768 where Jeffrey Tan FCJ said:

> [41] Before we adjourn, we would summarise the foregoing and pass on the following, as a guide to the trial courts. Whenever a registered title or interest is sought to be set aside under s. 340, first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If the title or interest is registered in the name of an immediate purchaser, the *bona fide* of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s. 340(2) had been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in s. 340(2) would not affect the title or interest of a *bona fide* subsequent purchaser. The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a *bona fide* subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith for a valuable consideration, or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.

[32] This was exactly what the courts below did in the present case. But they came to different conclusions. The High Court found AmBank as an immediate purchaser while the Court of Appeal found AmBank as the subsequent purchaser. Basically, the Court of Appeal agreed with learned counsel from AmBank that the trial judge in deciding that AmBank was an immediate purchaser had failed to appreciate the following:

> (a) AmBank had derived interest as chargee of the property from Wong and not CIMB;
>
> (b) CIMB's charge was discharged before Wong was registered as the proprietor of the property; and
>
> (c) the financing of the property involved a two-stage transaction.

[33] Thereafter, the Court of Appeal went on to hold:

> [26] We found merits in the aforesaid contention and our reasons were these. As pointed out by learned counsel, the sequence of presentation of the dealing on 25 November 2009 was as follows:
>
> (a) The lodgment of the Discharge of CIMB's Charge *via* Form 16N;
>
> (b) Then the lodgment of the memorandum of transfer from Chings to Wong; and
>
> (c) Finally the lodgment and registration of AmBank's Charge.

[27] *Though the above dealings were on the same day and were done simultaneously, it cannot be disputed nor can we ignore the fact that the lodgment of the AmBank's Charge could not have been created until the first two steps had been executed. That being the case, the only way AmBank obtained their interest was from Wong and not CIMB. CIMB's interest in the property had been extinguished by the forged discharge resulting in Wong becoming the immediate purchaser. AmBank then derived their interest in the property from the charge executed by Wong. Under such circumstances, there cannot be any relationship between CIMB and AmBank, and hence the learned Judge, with respect, erred when he said "it is clear that the relationship between the Plaintiff (CIMB) and the 1st Defendant (AmBank) was that of an immediate purchaser and not a subsequent purchaser ...". When AmBank became the chargee from Wong's me*morandum of charge, AmBank became the subsequent purchaser.

[28] *Further, we said that the fact that Wong's interest being an immediate purchaser was defeasible by CIMB did not, in our view, affect the indefeasibility of AmBank's interest. Our view is supported by the two decisions of the Apex Court,* namely *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLRA 432; [2014] 2 MLJ 768 and *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 1 MLRA 1; [2010] 2 MLJ 1.

[34] *We are in total agreement with the reasoning of the Court of Appeal. AmBank must be a subsequent purchaser. As discussed earlier, AmBank, being a chargee was a holder of subsequent interest in the property and thus, was protected by the proviso of s. 340(3) of the NLC.* (emphasis added)

[35] As always, every case is fact-sensitive including on applying the law to them.

[36] In *Tan Yin Hong v. Tan Sian San & Ors* (*supra*), Zaki Tun Azmi CJ illustrated on how s. 340 of the NLC would apply to the facts of each case as follows with emphasis added by us:

[4] I would like to look at s. 340 of the NLC in a more simplified manner.

[5] *Let us refer to the first owner of a piece of land as "A" who then transfers the same piece of land to "B" and which subsequently is transferred to "C".*

[6] *As far as s. 340(1) of the NLC is concerned, A's title to the land is totally indefeasible. In short if A's name appears on the registration, no one can come and claim for that title. The law will not entertain it at all.*

[7] *Now comes the next person, B, whose name appears in the register. If it can be shown that the title or interests obtained by B was obtained by fraud or misrepresentation by him or anyone else to which he was a party or privy then his claim to the title or interest can be defeated. (See s. 340(2)(a) of the NLC). Otherwise B stands in the same position as A.*

[8] *The situation where it is proved that the registration in B's name was obtained by forgery or by means of an insufficient or void instrument is the same (See s. 340(2)(b) of the NLC). His title or interest to the land is liable to be set aside*

by the previous owner who has a good title. In this latter instance, there is no need to show that B was a party or privy to that forgery or to obtaining the title or interest by a void instrument.

[9] *The third instance where B's title or interest could be defeated is where it was unlawfully acquired through the exercise of any power or authority conferred by any law. Section 340(2)(c) of the NLC deals with one who was for example acting in his capacity as an agent to a power of attorney. Even if C is in the same position as B, sub-section (3) also does not give protection to C unless he can show that he had acquired the title or interest in good faith and for valuable consideration.* Any title or interest gained by any person thereafter is also liable to be set aside unless it could be shown that he had acquired it in good faith and for valuable consideration. This is what is called deferred indefeasibility of title. If his title or interest is challenged on similar grounds, the burden of proving there was valuable consideration and good faith lies on him.

[10] As far as I am concerned, that is the simplest way of looking at s. 340 of the NLC. I totally agree with the learned Chief Judge of Malaya's view that the error committed by the Federal Court in *Adorna Properties Sdn. Bhd. v. Boonsom Boonyanit* was to read the proviso to sub-section (3) as being a proviso to sub-section (2) as well. The error is very obvious because the proviso expressly refers to "this sub-section" which must in the context of that sub-section be read as proviso to sub-section (3) only. (emphasis added)

[37] Adopting the simplified manner of analysis of Zaki Tun Azmi CJ, we find that both the *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* (*supra*) case and *Tan Ying Hong v. Tan Sian San & Ors* (*supra*) case involved forgery by A. The transferred title of B was not set aside in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* (*supra*), case but the registered charge was set aside in the *Tan Ying Hong v. Tan Sian San & Ors* (*supra*) case because B was held to be an immediate chargee that could not resort to the proviso in s. 340(3) of the NLC. In respect of the *CIMB Bank Bhd v. Ambank (M) & Ors* (*supra*) case, it also involved forgery by A to discharge the charge and transfer of the title to B. C, the eventual chargee of the charge created by B was held to be a subsequent chargee. As to the *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* (*supra*), it is a case of competing interests in the land by reason of double dealings rather than strictly linear dealings between A and B and thereafter B and C that involved vitiating factors such as forgery or fraud.

[38] Since the *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* (*supra*) case is strictly not a case that directly concerned s. 340 of the NLC, the *dicta* of Abang Iskandar FCJ (now PCA) as reproduced in para. [33] above must necessarily be *obiter dicta* only.

[39] The relevant fact scenario here involved forgery by A but also with B in fraudulent cahoots (established by reason of the default judgment) and thereafter transferred to C.

[40] In this regard, it was held by Azahar Mohamed FCJ (later CJ (Malaya)) in *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441 FC as follows on similar facts with emphasis added by us: A

> [128] *As a subsequent purchaser, the first defendant had purchased the land in good faith and for valuable consideration. The High Court found that the first defendant had at all material times neither knowledge nor notice of the commission of the fraud by the second defendant in cahoots with the fraudster that resulted in the transfer of the land to the second defendant.* In respect of the sale of the land by the second defendant to the first defendant, the first defendant appointed its solicitors T. S. Teoh & Partners. Both the first defendant and its solicitors conducted land searches on the land before the entry of the sale and purchase agreement between the first defendant and the second defendant. The searches done on 13 July 2006 and 21 July 2006 revealed that the title was clean and free from caveats including the private caveat lodged by the plaintiff's son on 1 March 2001. B C
>
> [129] *Applying the well established principle to the present case, it is our considered opinion that the first defendant who conducted searches on the register and purchased the land in good faith and for valuable consideration, had, upon registration as the proprietor on the register document of title, acquired an indefeasible title, notwithstanding that the second defendant's title itself is defeasible. Hence, subsequent transfer of the land to the first defendant and the registration thereof in the name of the first defendant was indefeasible by reason that the first defendant was the bona fide purchaser for valuable consideration.* (emphasis added) D E

[41] By analogy, we therefore hold that Bitara Angkasa is a subsequent purchaser that acquired deferred indefeasibility to the title of the land notwithstanding that Charles Oh had committed fraud in cahoots with LC Cheok's imposter. F

[42] We are further mindful that the fraud by Charles Oh here is only presumed based on the default judgment obtained by LC Cheok following the case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* (*supra*) unlike in *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* (*supra*) where it was affirmatively proved; see *Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors* [2016] 4 CLJ 510; [2015] 2 AMR 767. G

[43] In the premises, we therefore find that the learned High Court Judge has plainly erred in law that justified our appellate intervention.

(ii) Is Bitara Angkasa A Bona Fide Purchaser For Valuable Consideration? H

[44] As the matter of law, a subsequent purchaser will only have an indefeasible title if that person is a *bona fide* purchaser for valuable consideration pursuant to the proviso in s. 340(3) of the NLC.

[45] In this respect, Richard Malanjum JCA (later CJ) had in *State Tailor Sdn Bhd v. Nallapan* [2005] 2 CLJ 167; [2005] 2 MLJ 589 CA defined '*bona fide*' purchaser as follows with emphasis added by us: I

A The term '*bona fide*' purchase had been used in a host of cases. *Simply put it means a buyer in good faith. And the basic element of good faith is the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry of the transaction. But the overriding consideration is the 'Particular circumstance of each case' ...* (emphasis added)

B **[46]** Moreover in *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526 CA, Raus Shariff JCA (later CJ) held as follows with emphasis added by us:

Had the learned trial judge taken the above facts and circumstances into consideration, he cannot possibly conclude that the 1st defendant was a
C *bona fide* purchaser for valuable consideration, so as to be protected under s. 340(3) of the Code. To me, the 1st defendant had acted hastily. He concluded the sale without any proper investigation into the title or the persons claiming to be proprietors. No doubt he had every right to take advantage of the low price that was offered to him but he took the risk. When he embarked into such risk, it cannot be at the expense of the
D plaintiffs. This is because while he had a choice, the plaintiffs had none. In fact, the plaintiffs were helpless. The plaintiffs could not do anything to prevent the fraud. Even locking the title in a safe would not had help the plaintiffs. In such circumstances the court must not favour the 1st defendant, over the plaintiffs. To do so, would be doing injustice to the plaintiffs.

E

Further, had the evidence adduced in this case been properly considered and assessed by the learned trial judge, a reasonable inference would be that the 1st defendant knew at the time he bought the said land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase.
F In doing so he disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. My respectful view is that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. In *Oliver v. Hinton* [1899] Chancery Division 264 Lindley MR said:

G *To allow a purchaser who acts with such gross carelessness to deprive a prior innocent mortgagee of her priority would be the greatest injustice.*

So too here. The 1st defendant is under the obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions which ought to be taken in such a matter
H *he is not entitled to the protection of the court.* (emphasis added)

[47] On the facts before us, we are satisfied that Bitara Angkasa after having seen the land introduced by a property agent was interested to purchase the same for property development and accordingly in late 2016 instructed its
I solicitors, Messrs Kelvin Phang & Associates to carry out the necessary searches on the land. The search results on the title of the land reveal that

the original registered proprietors of the land LC Cheok and Cheok Yit Tuck as co-trustees transferred it to LC Cheok who then transferred it to Charles Oh. There were Khong Jin Teong and Tan Poo Chuan who lodged private caveats on the land on 19 September 2016. However, the property agent informed Bitara Angkasa that the private caveators were no longer interested in the land. Thus, the private caveats were removed in January 2017.

[48] Subsequently, Bitara Angkasa bought the land from Charles Oh at the price of RM1,200,000 and the transaction was handled by their respective solicitors *viz.* Messrs Kelvin Phang & Associates and Messrs Zahir Razak & Co. A proper sale and purchase agreement, to wit the second SPA was drawn up.

[49] The purchase price was fully paid, *albeit* late, but Bitara Angkasa also paid late payment interest amounting to RM46,525.38 to Charles Oh. This was because Bitara Angkasa initially applied for a loan from the financial institutions and secured an indicative offer from Pac lease but that offer was withdrawn when it was discovered that an additional sum of RM800,000 is required for earthworks due to the presence of a pond at the land. As the result, Bitara Angkasa had to seek Looh Chai Boon to invest in the proposed housing development on the land. And this was done *via* an unorthodox, complicated sale and purchase/security arrangement. Looh Chai Boon who paid RM1,100,000 also lodged a private caveat to protect its interest in the land.

[50] Since the purchase price of the land has been fully paid by Bitara Angkasa which normally is the dominant consideration as well as there were proper searches done on the land followed by proper conveyancing documentation by Bitara Angkasa's solicitors, we are satisfied and find that Bitara Angkasa is a *bona fide* purchaser for valuable consideration of the land.

[51] We are aware the learned High Court Judge doubted the *bona fides* of Bitara Angkasa mainly because of the unsatisfactory unorthodox complicated financing arrangement done with Looh Chai Boon as particularised in para. [22] above. He also questioned the slipshod manner the conveyancing solicitor dealt with the signatory and attestation on the Form 14A transfer of the land between Charles Oh and Bitara Angkasa.

[52] Although the manner the conveyancing transaction and financing arrangements that were done in relation to the purchase of the land by Bitara Angkasa from Charles Oh are arguably non-perfect and which subsequently did not materialise, we are however not convinced that there were *mala fides* involved. It is material that Bitara Angkasa paid the purchase price of the land but how the financing of the purchase had been procured to enable making that payment is not material, if not also irrelevant in our view. Additionally, we find that Bitara Angkasa had reasonably taken the ordinary

land conveyancing precautions carried out by solicitors. It was also not done in extraordinary haste unlike that in *Tirai Kristal Sdn Bhd v. Pengarah Tanah Dan Galian Wilayah Persekutuan Kuala Lumpur* [2018] 2 CLJ 212; [2018] 4 MLJ 361. Hence, we find that learned High Court judge erred in fact and law when he found that Bitara Angkasa is not a *bona fide* purchaser of the land in the circumstances and that warrants appellate intervention too.

[53] Consequently by reason of our findings in paras. [44] and [52] above, Bitara Angkasa's appeal must be allowed and the title to the land be re-vested to Bitara Angkasa.

[54] For completeness and *albeit* it was neither pleaded in the High Court pleadings nor raised as a cross or separate appeal here, we will briefly deal with LC Cheok's contention that the transfer of the land by the imposter of LC Cheok was null and void because there was no record in the Land Registry of the transfer of the land from LC Cheok and Cheok Yit Tuck as joint trustees to Cheok Yit Tuck solely. In this regard, it is again gainful to refer to *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* (*supra*) where Azahar Mohamed FCJ (later CJ (Malaya)) held as follows:

> [111] In our opinion, as correctly stated by the High Court in the present case, the land title would be void *ab initio*, if and only if, the land registry had, in blatant breach of its duty under the NLC wrongfully registered any land in the register document of title and issued the replacement issue document of title in the name of a third party.

[55] We are however of the view that there is no cogent evidence adduced by LC Cheok to demonstrate that the Land Registry had blatantly in breach wrongly registered and issued a replacement title of the land to a third party. Although the Land Registry could not produce the material records to exactly explain the occurrence, we noted from the land search results that it was in fact only a title transfer between co-owners as trustees to one of them only rather than the issuance of a replacement title to a third party altogether. This did not therefore fit into the strict limited category that rendered the registered title null and void in law.

(iii) Claim Against The Land Registry?

[56] By virtue of the finding in para. [52] above, it is unnecessary for us to deal with Bitara Angkasa's claim for contribution or indemnity against the Land Registry by reason that Bitara Angkasa suffered no actual loss.

[57] Nonetheless, we are mindful that the actual loss befalls on the original registered proprietor of the land, LC Cheok as trustee (so conceded before us *albeit* not pleaded as such).

[58] Although LC Cheok has not appealed against the Land Registry (understandably because LC Cheok won in the High Court), we are mindful that in the event Bitara Angkasa succeeds in its appeal, the recourse now available to LC Cheok may be found in s. 69(5) of the Courts of Judicature Act 1964 ("CJA") which provides as follows:

> **69. Hearing of appeals**
>
> (1) Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court or through a remote communication technology, by affidavit, or by deposition taken before an examiner or commissioner
>
> (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.
>
> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.
>
> (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.
>
> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties, although the respondents or parties have not appealed from or complained of the decision.

[59] In this respect and since LC Cheok has made a claim against the Land Registry in the High Court, we find that s. 69(5) of the CJA may properly be invoked if LC Cheok has a meritorious cause of action against the Land Registry.

[60] There is of course s. 22 of the NLC available to the Land Registry in defence which provides as follows:

> **22. Protection of officers**
>
> No officer appointed under this Part shall be liable to be sued in any civil court for any act or matter done, or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act.

[61] Although, the statutory provision on its literal interpretation applies to officers of the Land Registry only, we are nonetheless of the view that by its purposive interpretation will also apply to the Land Registry.

[62] In *Pendaftar Hakmilik Negeri Selangor & Ors v. Shaifulizam Mohd Saleh & Anor And Another Appeal* [2020] 5 CLJ 595 CA, Zaleha Yusof JCA (later FCJ) held as follows with emphasis added by us:

> [35] According to the evidence of the 12th and 13th defendants, the issue document of final title could only be given to the plaintiff upon production and surrender of his old issue document of qualified title. It was also the evidence of the 12th defendant that when a landowner comes to the land office to collect his new issue document of title, he must at the very least bring his old issue document of title and identity card. Without proof of his identity and evidence that he has his old issue document of final title, he will not be given his new issue document of title. If a new issue document of title is not collected, according to the 12th defendant and another witness SD12, it should be kept in the Pejabat Tanah Petaling's safe room. As explained by the witnesses for the third to 13th defendants themselves, the procedure for safeguarding an uncollected issue document of title if followed strictly would have made it impossible for anyone but the true owner of the land named in the issue document of title to collect that title.
>
> ...
>
> [37] Next is the issue of the transfer of the title of the said property to the first defendant. The question raised is how did the final title of the said property fall into the hands of the first defendant? Section 90 of the NLC requires the final title to be retained by the land office. But it fell into the hands of the first defendant. And yet the land office did not have any record as to whom the final title in respect of the said property was released to. *As alluded to earlier, their own witness admitted that there was a deficiency in the record keeping systems and there were shortcomings on their part.* Their witnesses even admitted there was negligence on their part. To further aggravate matters, the land office's file for the said property was missing.
>
> [38] *Such acts and omissions on the part of the land office amount to improper conduct and these improper conduct of the land office reflect bad faith on their part which, in our view, clearly show negligence on their part. Further, the non-compliance of the NLC shows a breach of their statutory duty which is equally a breach of a common law duty of care. The land office has failed in our view to properly keep land title details and land titles secure in the manner required by the NLC. In Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v. Poh Yang Hong [2016] 9 CLJ 297, the Federal Court had inter alia held that the administrative shortcoming on the part of the Land Administrator or Registry amounts to negligence.* This is clearly the case here as admitted by the land office's own witnesses. (emphasis added)

[63] Moreover in *Overseas Realty Sdn Bhd v. Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party)* [2014] 8 CLJ 107, Harmidar Singh J (now FCJ) held as follows with emphasis added by us:

> [52] **As the fourth to sixth defendants have failed in their statutory duty to ensure a safe system of land registration, they will have to indemnify the second and third defendants.** The measure of loss of the third defendant is more straightforward and it has to be the amount due on the loan. As such, the fourth to sixth defendants are to pay the third defendant the sum of RM479,387.02 with interest at BLR 1.60% per annum from 29 August 2013 till judgment and thereafter at 50% per annum from judgment till settlement. It is expected that with this payment, the third defendant will no longer have any claims against the second defendant on the loan and the charge. (emphasis added)

See also: *Yew Foo Chun v. Wong Nye Keong & Ors* [2014] 1 LNS 189.

[64] Likewise in the High Court below here, LC Cheok, amongst others, contended that the Land Registry was grossly negligent in issuing a new title of the land notwithstanding that the original manual title of the land has still been in the possession of Seah Choon Chye authorised by LC Cheok and Cheok Yit Tuck as joint trustees (see para. [5] above) as well as in transferring the land to Charles Oh without ascertaining the true identity of the transferor (see para. [9] above). Towards this end, the Land Registry has never sought from them to surrender the original manual title of the land. As the result of the issuance of the new title by the Land Registry, the land was transferred by an imposter of LC Cheok to Charles Oh and thereafter to Bitara Angkasa; thus, LC Cheok was unfairly deprived of the ownership of the land. Furthermore, the resultant transfer of the land to Charles Oh and thereafter the transfer to Bitara Angkasa permanently deprived LC Cheok of the ownership of the land.

[65] We are surprised that the Land Registry explained at trial that it did not have any record whatsoever on the issuance of the new title and the resultant transfer that took place in respect of the land. Furthermore, the Land Registry could not explain the reason for the issuance of the new title and transfer of the land from LC Cheok and Cheok Yit Tuck as joint trustees to LC Cheok and transferred from LC Cheok to Charles in spite that the Land Registry was then still operating under the manual system having a master register document of title pursuant to s. 158 of the NLC. Also, the Land Registry could not adequately explain the transfer for the land to Charles Oh, particularly why there was no ascertainment of the true identity of the purported LC Cheok. We noted that there was no formal comprehensive internal investigation carried out by the Land Registry to ascertain the truth of the matters. In other words, there was no explanation by the Land Registry at all to account for their statutory acts and omissions.

[66] This non-explanation did not bode well for the Land Registry in defence against LC Cheok's gross negligence claim against them following *Pendaftar Hakmilik Negeri Selangor & Ors v. Shaifulizam Mohd Saleh & Anor And Another Appeal* (*supra*).

[67] In the premises, we find and hold that the Land Registry must compensate LC Cheok as trustee for the beneficiaries damages for loss of their land and litigation expenses incurred as the result thereof.

[68] Although the learned High Court Judge need not then decide on LC Cheok's claim against the Land Registry because LC Cheok succeeded against Bitara Angkasa, we now find that the LC Cheok has in the circumstances based on *res ipsa loquitor* established gross negligence on the part of the Land Registry in the discharge of their statutory duty. That notwithstanding, the non-explanation could not also avail the Land Registry reliance on s. 22 of the NLC either since the burden of proof is upon the Land Registry to prove that it has acted in good faith.

Conclusion

[69] For the foregoing reasons, we unanimously allow Bitara Angkasa's appeal against LC Cheok and the decision of the High Court is set aside with costs of RM80,000 subject to allocator. We make no order in respect of Bitara Angkasa's appeal against Charles Oh.

[70] We also dismiss Bitara Angkasa's appeal against the Land Registry with no order as to costs.

[71] Additionally, we unanimously enter judgment for LC Cheok against the Land Registry in terms of para. 46(h) and (i) of the statement of claim to be assessed by the High Court and costs of RM30,000.